

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 12 December 2006**

**BALCA Case No.: 2006-INA-00001**  
**ETA Case No.: P2004-NY-02510413**

*In the Matter of:*

**MURSHEDA KHATUN,**  
*Employer,*

*on behalf of*

**MD. HASANUZZAMAN,**  
*Alien.*

Appearance: Robert A. Murtha, Jr., Esquire  
New York, New York  
*For the Employer and the Alien*

Certifying Officer: Dolores DeHaan  
New York, NY

Before: **Burke, Chapman, and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification in the above-captioned matter.<sup>1</sup>

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<sup>1</sup> Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. We base our decision on the record upon which the CO denied

## **STATEMENT OF THE CASE**

On July 24, 2002, the Employer, Mursheda Khatun, filed an application for labor certification to enable the Alien, Md. Hasanuzzaman, to fill the position of “Cook (Household) Live in” (AF 437). The Employer advertised the job opportunity as a “Live-in” position, and requested Reduction in Recruitment (RIR) on the basis of such advertising (AF 450-455). The application set forth a 44-hour work week, including a split-shift (*i.e.*, Mon-Fri 6:00 AM to 10:00 and 3:00 PM to 7:00 PM) and four weekend hours (*i.e.*, Sat. 8:00 AM to 12:00 PM). It did not specify a live-in requirement (AF 437). The job duties for the position, as stated on the application, were as follows:

Prepare, cook and serve food: vegetables, stews, kebabs, pastas, rice’s [sic], nan (breads), samosa’s [sic] and pakora’s [sic], for all the household members in a private home and for frequent entertaining and dinner parties. Plan the menu and cook lunch and dinner meals according to recipes of employer’s taste, estimate food consumption and purchase foodstuffs, clean kitchen and utensils. Overtime will be paid after 40 hours.

(AF 437, Item 13). The Employer required two years of experience in the job offered (AF 437, Item 14).

On June 10, 2005, the CO issued a Notice of Findings ("NOF"), in which she approved the Employer’s request for RIR processing, but proposed to deny certification on the grounds that the Employer (1) had not documented that there is a bona fide job opportunity which actually exists that is open to U.S. workers under section 656.20(c)(8), and (2) had not established that the household has sufficient funds available to pay the wage or salary offered, as provided in section 656.20(c)(1). (AF 433-435). The Employer submitted a rebuttal thereto on June 17, 2005 (AF 276-432). However, in the Final Determination, dated August 31, 2005, the CO found the rebuttal unpersuasive and denied certification (AF 273-275). On September 30, 2005, the Employer requested a

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certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

review of the denial (AF 1-272). Subsequently, this matter was forwarded to the Board of Alien Labor Certification Appeals. On November 3, 2005, we issued a Notice of Docketing and Order Requiring Statement of Position or Legal Brief. Although Employer did not respond thereto, the grounds for the appeal are set forth in the request for review.

## **DISCUSSION**

In the NOF, the CO cited applicable regulations, and set forth a series of questions requesting specific information, such as the number of meals, preparation time, number of people for whom the meals are prepared; the daily schedules for each household member; issues related to children in the household, if applicable; any special dietary circumstances of the household; percentage of the Employer's disposable income devoted to pay the Alien's salary; information regarding other domestic workers employed in the household, if applicable; and changes in circumstances which led to the current job offer. (AF 434-435). Furthermore, the CO stated, in pertinent part:

***Your responses, documentary evidence, and all other relevant factors, will be evaluated to determine whether the position of Domestic Cook actually exists in your household. The adequacy of the documentation will be key to the evaluation of your application because little weight will be accorded to conclusory statements. Merely answering all the questions does not insure approval of the application.***

(AF 434). (Emphasis in original).

The rebuttal consisted of the Employer's letter dated June 17, 2005 (AF 276-278), and various financial records, including a letter from a tax and financial consultant (AF 279-285, 432), tax returns for 2001 through 2004 (AF 286-374), bank and savings account statements (AF 375-413, 416-418), and various other data, such as W-2s, rental property deeds, and notes (AF 414-415, 419-431).

In the Final Determination, the CO analyzed the rebuttal evidence, and stated, in

pertinent part:

In our Notice of Findings on pages 2 and 3, we asked a series of eight questions concerning the bona fide nature of the job opportunity within the employer's household as a permanent full-time Household Cook. Employer's rebuttal does not successfully address these questions.

According to the employer's rebuttal, the household consists of a working married couple, two children, and the husband's father. The Cook will work from 6 am to 7 pm from Monday through Friday (with breaks) and will work from 8 am to Noon on Saturdays. The husband is out of the house from 8 am through 7 pm; during the week, his schedule only overlaps with the Cook's from 6 am to 8 am. The wife's schedule overlaps with the Cook's from 6 am to 7:30 am from Mondays through Thursdays. Both children leave the house before their daily classes at 7:45 am and return in the afternoons after 3 pm. The husband's father's schedule is not provided, but he is said to manage child care and non-food-related housework, along with the other two adults. Although the rebuttal does not contain an entertainment schedule, it indicates more than monthly entertainment involving 10 to 25 guests. Employer indicates that they have never before employed a domestic Cook and that the current job offer is occasioned by the employer's household being busier and more prosperous than it has been until now.

The employer states that about a third of their disposable income will be expended in paying the Cook's wages, but employer's tax returns do not appear consistent with this statement. \* \* \*

(AF 274-275) The Final Determination then detailed what the Employer's tax returns showed as adjusted gross income and taxable income from 2001 through 2004, using this as an estimate of the Employer's disposable income. The CO concluded that, although the Employer's adjusted gross income has increased over that period, its disposable income had actually decreased. The CO continued:

Accountant's letter dated June 29, 2004 advances the opinion that the employer has the financial ability to pay the proffered wage, but does not provide convincing evidence of this assertion. Although the accountant states that a Homeland Security Procedural Guidance uses employer's wages as a measure, the accountant agrees that it does not fully answer whether the salary can be paid. The accountant argues that the net current assets income of the employer will document the ability of the employer to guarantee the Cook's wages, but employer's account in Astoria federal

Bank has a balance of less than \$[ <sup>2</sup> ] at its most recent closing and employer has shown a consistent loss due to rentals on their taxes over the years. Although the employer includes information on bank accounts and deeds for properties, these do not indicate a consistent income that guarantees the alien's wages. At any given time, it does not appear that employer's taxable income combined with employer's liquid assets is sufficient to guarantee alien's wages for [sic] on a permanent basis, particularly considered [sic] that employer has not been encumbered with these wages up until now, according to the ETA form 750 B item 15.

We hold that the evidence on file is insufficient to substantiate a bona fide full-time job opening for a domestic cook exists within the employer's household.

Due to the deficiency, this application, for Alien Employment Certification is denied.

(AF 274-275). We agree.

In *Carlos Uy III*, 1997-INA-00304 (Mar. 3, 1999)(en banc), the Board held that a CO may properly invoke the bona fide opportunity analysis authorized by 20 C.F.R. §656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. A totality of the circumstances test is applied. Among the various factors to be considered are: the inherent implausibility of a household using a very high percentage of its disposable income to hire a cook; whether the employee will be engaged in cooking duties for a substantial portion of the day; whether the employer employs other domestic workers; whether the employer has retained domestic cooks in the past, and if not, what circumstances prompted the instant job offer.<sup>3</sup>

It is well-settled that the employer bears the burden of proof in certification

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<sup>2</sup> The dollar amount was stated in the Final Determination, but we choose not to publish it in this decision.

<sup>3</sup> A general indicia of the employer's credibility or lack thereof in processing the application is also a factor under the totality of circumstances test. As stated above, the Employer advertised the position as a "Cook (household) Live-in," even though there is no live-in requirement. Moreover, the advertised work hours for the position are not the same as those set forth on the application (AF 452-454; *compare* AF 437). However, the CO did not cite the foregoing problems. In fact, the CO approved the RIR (AF 432-435). Accordingly, the foregoing inconsistencies are not the basis for our decision.

applications. 20 C.F.R. §656.2(b); *see Giaquinto Family Restaurant*, 1996-INA-00064 (May 15, 1997). As outlined above, the CO reasonably requested relevant information in the NOF, in order to ascertain whether there is a *bona fide* full-time job opportunity for the position of Cook within the setting of the Employer's household.

Based upon the rebuttal evidence presented, we agree with the CO's determination that the Employer failed to satisfactorily document the financial ability to pay the stated wage. In addition, the rebuttal evidence suggests that the employee will not be engaged in cooking duties for a substantial portion of the day, based upon the schedules of the other members of the household. Furthermore, the Employer acknowledged that the household has never employed a domestic cook in the past, and that the "change in circumstances" which prompted the job offer is simply that the Employer's improved circumstances have made them busier and more prosperous.

The Employer submitted new evidence and argument with the request for review seeking to establish their financial ability to pay the stated wage (AF 3, 13-14). It is well settled that evidence submitted after the issuance of the Final Determination together with the request for review cannot be considered on appeal pursuant to 20 C.F.R. §656.27(c). *See, e.g., Memorial Granite*, 1994-INA-66 (Dec. 23, 1994); *ST Systems, Inc.*, 1992-INA-279 (Sep. 2, 1993); *HGHB*, 1992-INA-267 (June 3, 1993). Moreover, the Employer's additional evidence and argument only shows a possible technical ability to pay the wage, seeking – *inter alia* -- to have taken into consideration assets such as the cash value of life insurance and an employee stock ownership plan, and the market value of properties owned by the Employer. We find, however, that it is implausible that a household would liquidate assets to pay a worker to cook its meals. We recognize that the Employer was taking depreciation deductions on its tax returns, suggesting that it has more cash available than the CO estimated. However, the potential cash involved still would mean that the Employer would be devoting a large percentage of its liquid assets to paying for a cook.

Having considered the relevant factors under the "totality of circumstances test,"

we agree with the CO's determination that the Employer failed to establish that the domestic cook position is a *bona fide*, full-time job opportunity. Accordingly, we find that labor certification was properly denied.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.